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Nos. 99-1257, 99-1263, 99-1265

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

MASSACHUSETTS AND NEW JERSEY,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN RESPONSE FOR RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected the Environmental Protection Agency's ("EPA's") standardless interpretation of Sections 108 and 109 of the Clean Air Act ("the Act"), and remanded under *Chevron* for EPA to fashion and apply a proper interpretation of the Act.

2. Whether the court of appeals acted within its jurisdiction in reviewing, as a final agency action ripe for review, EPA's ruling that it can implement a revised National Ambient Air Quality Standard ("NAAQS") for ozone pursuant to its general implementation authority under Section 172 of the Act, notwithstanding Congress' enactment of a specific implementation schedule for the ozone NAAQS in Section 181 of the Act.

3. Whether the court of appeals correctly held that the specific classifications and attainment dates set forth in Section 181 of the Act for the ozone NAAQS take precedence over EPA's general authority to devise classifications and attainment dates for the various NAAQS pursuant to Section 172 of the Act.

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INTRODUCTION

A properly reformulated version of the Government's first question is worthy of this Court's review for the reasons summarized in Part I below and detailed in the conditional cross-petition filed today by the American Trucking Associations, Inc., the Chamber of Commerce of the United States, and other "Small Business Petitioners" below (collectively "ATA"). The court of appeals invalidated the Environmental Protection Agency's ("EPA's" or "the Agency's") interpretation of its standard-setting authority under the Clean Air Act ("CAA" or "the Act"), using the framework provided by this Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). While the constitutionality of the underlying statutory provisions was never at issue, the court deployed the nondelegation and constitutional avoidance doctrines to invalidate EPA's statutory interpretation and to remand under *Chevron*. The court of appeals' interpretation was constrained by *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*"), a decision never reviewed by this Court. ATA acquiesces in *certiorari* on a question properly framed to include all of the interrelated issues involving the interpretation of EPA's standard-setting authority, recognizing that the constitutional issues discussed below might be avoided entirely if *Lead Industries* were held to be wrongly decided.

The second and third questions presented by the Government (as well as the similar questions presented by the American Lung Association and State petitioners), concern entirely separate provisions of the Act, and are patently unworthy of *certiorari*. They involve Subpart 2 of the Act's Title I, Part D, which codifies a detailed schedule for gradual attainment of the National Ambient Air Quality Standard ("NAAQS") for ozone. At issue is EPA's decision to supplant Subpart 2 by requiring the States to attain a revised ozone NAAQS on an accelerated schedule that overrides the Subpart 2 schedule. The Agency's justification? That the *specific* classifications and attainment dates set forth in Subpart 2 do not "restrict EPA's *general*

authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

The court of appeals unanimously rejected EPA's argument and not a single judge voted to rehear the case on this issue. The Government's attempt to dress up its Subpart 2 point by belatedly raising finality and ripeness arguments was also unanimously rejected by all three panel members, and drew no interest from the *en banc* court. As explained in Part II below, the second and third questions do not warrant *certiorari* for at least three separate reasons.

First, the court of appeals' ruling on Subpart 2, unlike its ruling on the main issue presented, is interlocutory. That is because the court of appeals unanimously reversed EPA's ozone NAAQS on other grounds. Specifically, EPA argued that it was barred by statute from considering record evidence from officials of three separate federal agencies that reducing ground-level ozone by the amounts predicted for EPA's ozone NAAQS could lead to thousands of additional skin cancer and cataract cases every year. The unanimous court of appeals made quick work of that argument, both in its initial decision and in denying rehearing.

The Government does not seek *certiorari* on this issue and indeed never even mentions that it must redo its ozone NAAQS *independently* of the issues on which *certiorari* is being sought. But that remarkable omission cannot disguise the fact that the substantial new proceedings now required will take years to complete. Specifically, the Agency must commence a new rulemaking that will require, *inter alia*: (1) a revised scientific review document; (2) additional review by the Clean Air Scientific Advisory Committee ("CASAC"); and (3) a new proposal and final rule that address the evidence, cited by the court of appeals, that lowering the ozone NAAQS may have a *negative* net health effect. Every aspect of the Subpart 2 issue is on hold until these proceedings are completed. Only then would any remaining questions about the implementation schedule for a newly revised ozone NAAQS have to be revisited

by the court of appeals and, if necessary, this Court. *See* Part II-A below.

Second, the Government's merits argument concerning Subpart 2 is entirely unconvincing, as the unanimous court of appeals decision demonstrates. It is a "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Tellingly, not one member of the D.C. Circuit accepted EPA's contention that the scheme for implementing *NAAQS in general* trumped the specific provisions of Subpart 2 governing implementation of the *ozone NAAQS* in particular. *See* Part II-B below.

Finally, there is simply no basis for the Government's argument that the court of appeals lacked jurisdiction to reach the Subpart 2 issue. EPA never argued that the Subpart 2 ruling which *it* had made in the rulemaking below was not final until *after* the panel unanimously ruled against the Agency. Even EPA's rehearing petition devoted only about one page to arguing finality and ripeness – arguments that were unanimously rejected. Even now, the Government relies only on easily distinguishable cases that hold only that agency rulings sometimes are not final where (unlike here) they were *not* subject to formal notice and comment rulemakings, were *not* published in the Federal Register, and were *not* expressly made subject to prompt judicial review by statute. None of these cases presents a circuit conflict with the decision below, nor can the Government plausibly argue that the panel's application of settled finality and ripeness principles conflicts with any decisions of this Court. *See* Part II-C below.

COUNTERSTATEMENT OF THE CASE

A. The Clean Air Act

Section 109 of the Act authorizes EPA to establish primary and secondary NAAQS for certain pollutants and to reconsider and, if necessary, amend those standards every five years. CAA § 109(a), 42 U.S.C. § 7409(a). In general, NAAQS enactment

and enforcement entails three steps: promulgation, designation/classification, and then implementation through State Implementation Plans ("SIPs"). Primary NAAQS are promulgated at levels "requisite to protect the public health" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). Secondary NAAQS are to be set at levels "requisite to protect the public welfare." CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2).

Following the promulgation of a NAAQS, EPA must designate each air quality area as an attainment, nonattainment, or unclassifiable area. *See* CAA § 107(d), 42 U.S.C. § 7407(d). The Agency then classifies each such area based on "factors such as the severity of nonattainment in such area," and assigns an attainment date based on that classification. *See* CAA § 172(a)(1), (2), 42 U.S.C. § 7502(a)(1), (2) ("Subpart 1").

As part of its 1990 amendments to the Act, Congress provided a "comprehensive plan for reducing ozone levels throughout the country." App. 33a. Each area is assigned a statutory classification based on the extent of its noncompliance with the existing ozone NAAQS, as well as a specific attainment date based on that classification. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) ("Subpart 2"). Congress enacted this regime to "strip[] the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment . . . ." App. 40a.

B. The EPA Rulemakings

Following the 1990 amendments, EPA initiated two rulemakings in 1996 to revise the NAAQS for ozone and particulate matter.

1. The Ozone Rulemaking

EPA's Clean Air Scientific Advisory Committee ("CASAC") is an independent scientific review committee that EPA must consult regarding NAAQS revisions. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2). In the ozone rulemaking, CASAC advised

the Agency that "there is no 'bright line' which distinguishes any of the proposed standards . . . as being significantly more protective of public health." J.A. (Ozone) at 239. EPA nonetheless replaced the existing 0.12 ppm one-hour ozone NAAQS with a 0.08 ppm eight-hour standard based on a "policy" judgment that the latter standard is "sufficient[]" in light of "hazards that research has not yet identified" and "uncertainties associated with inconclusive scientific and technical information." 62 Fed. Reg. 38,856, 38,857, 38,863, 38,867 (July 18, 1997). In so doing, EPA asserted the right to render decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." *Id.* at 38,883 (emphasis added).

The Agency also ruled out any consideration of the health tradeoffs (for example, the prospect that reducing ground-level ozone could increase cancer levels) or the economic costs of its proposed rule. Commenters had submitted evidence that the health disbenefits of reducing ground-level ozone to the degree that EPA proposed could more than offset any benefits from increased respiratory protection. In particular, a study by the United States Department of Energy documented that, while the new ozone standard would cause some reduction in respiratory ailments, it would also increase the incidence of skin cancer, melanoma, and cataracts by permitting more ultraviolet radiation to reach ground level. J.A. (Ozone) at 255-71. A further study by Office of Management and Budget staff members concluded that the "adverse health effects of . . . EPA's more stringent [ozone] NAAQS may be similar in magnitude to the respiratory-related beneficial effects of such an [ozone] reduction," and a study by EPA personnel produced comparable results. *See id.* at 2764, 3089. Nonetheless, the Agency claimed that taking account of all health effects would be "inconsistent with the Clean Air Act and ill advised from an environmental management policy perspective." *Id.* at 210.

EPA also refused to consider the economic costs of its proposed standard on the ground that *Lead Industries* and subsequent D.C. Circuit decisions "interpreted section 109 of the Act as precluding consideration of the economic costs or feasibility of NAAQS in setting them." 62 Fed. Reg. at 38,878. The Agency acknowledged, however, that the costs of attaining the revised ozone NAAQS would greatly *exceed* the resulting benefits, perhaps by as much as six times. *See* J.A. (Ozone) at 2919, 2924, 2932-34 (costs could exceed $9 billion; benefits could be as low as $1.5 billion).

EPA also rejected the contention, made by many commenters, that it lacked authority to revise the ozone NAAQS. Those commenters relied on Subpart 2 of the 1990 amendments, which requires EPA to classify each nonattainment area into one of five specific categories, and does not provide a category for areas with ozone levels lower than 0.12 ppm (the level of the existing ozone NAAQS). EPA responded that because Subpart 2 "simply govern[s] the implementation of the [existing ozone] standard," the Agency is free to revise the ozone NAAQS and then ignore Subpart 2 altogether. *See* 62 Fed. Reg. at 38,885.

2. The PM Rulemaking

The PM rulemaking consisted of essentially two rulemakings: one rulemaking on fine PM ("$PM_{2.5}$"), and one rulemaking on coarse PM ("PM_{10}"). Since 1988, EPA had regulated all particles with diameters less than 10 micrometers under a single standard. *See* App. 49a. In the rulemaking below, however, EPA determined that "coarse and fine particles pose independent and distinct threats to public health," and that separate standards should be established. *See id.*

Although EPA concluded that the PM standards should be strengthened, CASAC expressed skepticism that this was necessary. In particular, nearly half of CASAC's members concluded that the PM standard should not be tightened at all, and many of the remaining panelists agreed that EPA's

proposed standard was too strict. *See* J.A. (PM) at 3151, 3165-66. These CASAC panelists explained that EPA had "overstated" the claimed health benefits of its proposal, in part because pollutants other than PM might be responsible for the effects that EPA attributed to PM. *See id.*

In response, EPA acknowledged the great "uncertainty in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. 38,652, 38,655 (July 18, 1997). As it had in the ozone rulemaking, however, EPA asserted the right to promulgate the revised standard based on an *ad hoc* analysis that recognizes "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38,688.

EPA also acknowledged that compliance with its revised PM NAAQS would cost at least $37 billion annually, J.A. (PM) at 3477, making this the most expensive environmental program ever. By EPA's own estimate, the costs of even partial compliance would greatly *exceed* the total annual sales of small businesses in several sectors, and therefore drive such companies out of business altogether. *Id.* at 3611-12, 3628. As it had in the ozone rulemaking, however, EPA publicly stated that it would not consider these extraordinarily high costs. 62 Fed. Reg. at 38,683.

C. The Congressional Response

Congress responded by postponing the implementation of the revised ozone and PM standards, and thus providing time for pre-implementation judicial review. *See* Pub. L. No. 105-178, §§ 6101-03, 112 Stat. 107 (1998). In particular, Congress delayed implementation of the PM NAAQS until such a time as $PM_{2.5}$ monitors are put in place and three years' worth of data have been gathered. *See id.* § 6102. It also pushed back implementation of the ozone NAAQS by one year. *See id.* § 6103(a). Congress emphasized that "[n]othing" in its action

"shall be construed . . . to be a ratification of the ozone or [PM] standards." *Id.* § 6104.

D. The Court of Appeals Proceedings

1. Panel Proceedings

Before the court of appeals, EPA continued to assert that "nothing in the statute requires [the Administrator] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Ozone Br. at 43 (emphasis added). The D.C. Circuit disagreed. In particular, the court held that Section 109 must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. *See* App. 5a. The court of appeals accordingly "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement," and, "if appropriate, modify the disputed NAAQS." *Id.* 4a, 5a. Judge Tatel dissented on this point. *See id.* at 59a.

The D.C. Circuit also unanimously remanded for entirely separate reasons. In the coarse particulate case, the court held that EPA erred in adopting an "arbitrary indicator for coarse particle pollution." *Id.* at 53a. As for ozone, the court rejected, both as contrary to the plain language of the Act and as unreasonable, EPA's "bizarre" contention "that a statute intended to improve human health would . . . lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance." App. 47a.

Finally, while the court of appeals unanimously accepted EPA's contention that, notwithstanding the detailed provisions of Subpart 2, the Agency may still revise the ozone NAAQS, *see* App. 31a-43a, it unanimously rejected EPA's contention that "Subpart 2 specifically provides classifications and attainment dates only for nonattainment designations under the [existing] ozone NAAQS." *Id.* at 37a. The plain language and drafting history of Subpart 2 confirm that the subpart applies to all ozone NAAQS, including revised NAAQS. *See id.* at 38a-39a. Because Congress' detailed handiwork was "purposeful

and not the drafting error that EPA's interpretation implies," "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with . . . Subpart 2." *Id.* at 34a.

2. Rehearing Proceedings

In a petition for rehearing, EPA's lawyers argued that the Agency had followed a constitutional interpretation of the Act in the underlying rulemakings. The panel majority rejected that contention, and explained that "the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive therefrom." App. 73a. Accordingly, the court "express[ed] no opinion" on these *post hoc* rationalizations. *See id.* at 74a. The panel majority went on to emphasize that, when read in light of its context and purpose, the Act *could* be interpreted to provide a constitutionally sufficient "intelligible principle." App. 75a. Because the Act is ambiguous as to what that principle is, however, the court held that the appropriate remedy is a remand to the agency for development of a constitutional construction. *Id.* at 76a (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)).

EPA's rehearing petition also argued, for the first time, that the panel lacked jurisdiction to reach the Subpart 2 issue because the Agency "has taken no final action implementing the revised NAAQS." App. 77a. All three judges rejected that contention. *Id.* at 79a. The court explained that "[w]hether agency action is final for purposes of [judicial review] entails a functional, not a formal, inquiry." *Id.* at 77a. Here, EPA had expressed its definitive position on the implementation issue, which is "a pure question of law, the resolution of which would not benefit from a more concrete setting." *Id.* at 77a-79a. In addition, EPA's promulgation of the revised NAAQS "triggered" certain statutory provisions that "impose a number of requirements upon the states." *Id.* at 78a.

On the merits, EPA continued to press its contention that Subpart 2 amounts to a massive scrivener's error. *See* App. 79a. All three members of the panel again rejected that contention, and noted that "all five Subparts of the Clean Air Act providing requirements for nonattainment areas" contain the same language. *See id.* The *en banc* court unanimously denied rehearing on the Subpart 2 issue.

Two opinions dissenting from the denial of rehearing *en banc* addressed the main statutory interpretation questions. *See* App. 92a. Judge Silberman's dissent disagreed with the panel majority's use of the nondelegation doctrine. But he went on to emphasize that he was "quite uncertain" whether EPA's analysis satisfied the demands of "arbitrary and capricious" review. *See id.* at 96a. Judge Tatel also dissented from denial of rehearing and focused on use of the non-delegation canon. His opinion was joined by Chief Judge Edwards and Judge Garland. *See id.* at 97a.

REASONS FOR GRANTING THE PETITION IN PART AND DENYING THE PETITION IN PART

I. THE COURT SHOULD GRANT *CERTIORARI* BOTH ON THE GOVERNMENT'S FIRST QUESTION AS REFORMULATED TO REFLECT THE COURT OF APPEALS' ACTUAL HOLDING AND ON ATA'S CONDITIONAL CROSS-PETITION.

ATA submits that the court of appeals was certainly correct when it invalidated EPA's standardless interpretation of Sections 108 and 109, but also that the proper interpretation of these provisions is so exceptionally important that *certiorari* is warranted on that issue. In rejecting EPA's interpretation under *Chevron*, the panel majority faithfully followed this Court's precedents holding that constitutional avoidance and nondelegation principles retain vitality as construction canons. While the court was right to condemn EPA's assertion of unbridled and *ad hoc* policymaking authority, ATA submits that all sides would benefit from this Court's authoritative

construction of the Act for the reasons set forth in ATA's conditional cross-petition.

A. The Court of Appeals Correctly Employed Constitutional Avoidance and Nondelegation Principles to Invalidate EPA's Standardless Statutory Interpretation.

The Government bases its unusually strong condemnation of the court of appeals' decision on a red herring. The court of appeals did not hold Section 109 unconstitutional, much less mark out a "radical departure from settled law." Pet. 9. Instead, the D.C. Circuit merely (1) applied the traditional rule that agencies must construe their authorizing statutes to provide some "intelligible principle" to confine agency discretion and guide judicial review; and, finding that EPA failed to follow such an interpretation, (2) "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement." App. 4a, 5a.

It is therefore common ground that "'in our increasingly complex society . . ., Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" Pet. 16 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). There is also no dispute that while "the doctrine of unconstitutional delegation is . . . a fundamental element of our constitutional system," it is not "readily enforceable by the courts" in the manner of other constitutional guarantees. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

Confronted by these exigencies, the Court has responded, not by abandoning this "fundamental element" of the Constitution, but by transforming the nondelegation doctrine into a canon of construction. In particular, this Court has consistently held that Congress may delegate policymaking discretion to agencies *if* it provides an "intelligible principle" to guide the exercise of that discretion. *See, e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta*, 488 U.S. at 372; *FEA v. Algonquin SNG*, 426 U.S. 548, 559 (1976). And, consistent with the

doctrine of constitutional avoidance, this Court has wielded this rule to construe statutes narrowly in order to supply the requisite "intelligible principle." *See, e.g., Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (plurality opinion) ("*Benzene*"); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). Accordingly, while consistently rejecting claims that statutes should be *struck down* under the non-delegation doctrine, this Court has never waivered in "*giving narrow constructions* to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 374 n.7 (emphasis added).

The court of appeals' deployment of these well-established construction canons hardly constitutes a "striking departure from this Court's nondelegation jurisprudence." Pet. 11. Rather, the "striking" fact about this case is that an agency of the federal government would assert and then defend up to the Supreme Court a supposed right to allocate tens of billions of dollars of public and private resources through decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." 62 Fed. Reg. at 38,688 (emphasis added).

Nor is there truth in the various other hyperbolic accusations hurled by the Government. Far from "overlooking this Court's instruction that the starting point for analysis of a nondelegation claim should be the statute's language, purpose, history, and context," *see* Pet. 12 (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)), the court of appeals expressly complied with that instruction, instructed the Agency to follow it, and quoted *American Power & Light* for that very proposition. *See* App. 75a. Nor did the court "expressly reject[] EPA's view that the relevant provisions of the CAA . . . set out intelligible principles." Pet. 7-8 (mischievously citing the *entirety* of the rehearing opinion below). Instead, the court proposed such a principle itself, noted that EPA "may well find

a completely different method for securing reasonable coherence" on remand, and went out of its way to "express no opinion" on the sufficiency of a principle proposed for the first time by EPA's appellate counsel on rehearing. *See* App. 18a, 74a. And finally, far from holding that "the nondelegation doctrine requires . . . a quantitative rule for deciding the precise degree of protection required for a given health or safety standard," Pet. 17; *see also id.* (court requires "exactly the 'right' result"), the panel made clear that EPA would retain authority to exercise "'policy judgment,'" and noted that it had previously upheld on nondelegation grounds an agency interpretation that allowed standards to be set "somewhere between" a given level and "some 'moderate' departure from that level." *See* App. 12a-13a.

As the court of appeals patiently explained, constitutional issues are lurking in this case only because the Agency's "construction" of its governing statute amounts to no construction at all. Specifically, the interpretation fails to "speak to" the critical question presented by the statute – the "issue of degree"– and thus leaves the agency "free to pick any point" it chooses. *See* App. 5a, 7a, 13a. Moreover, the inherent vice of EPA's interpretation is further worsened by the context in which it was issued – promulgation of the most expensive environmental program ever. In view of "the unprecedented power over American Industry that would result from the Government's view," a construction that "avoids this kind of open-ended grant should certainly be favored." *See Benzene*, 448 U.S. at 645, 646 (plurality opinion).

In the end, the Government is left with the surprising accusation that, by remanding to EPA so that the Agency itself can adopt a more constrained view of its authority, the court of appeals undertook a "fundamental change in the nature of judicial review of agency standard-setting" that would "expand the role of courts" and lead to "otherwise unwarranted judicial supervision in the exercise of administrative discretion." *See* Pet. 9, 16-17.

Once again, this is mere hyperbole. On its own terms, the court of appeals simply made the inevitable reconciliation between use of the modern nondelegation doctrine as a tool of interpretation, on the one hand, and the deference accorded under *Chevron* to agencies' interpretations of their governing statutes, on the other. As the court of appeals explained, "just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority." App. 76a (citing *Chevron*). In this regard, the remedy selected below is functionally indistinguishable from the work-a-day remands courts issue every time they invalidate an unreasonable agency interpretation under *Chevron*. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 738 (1999); *City of Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191 (D.C. Cir. 1991).

B. This Court Should Grant *Certiorari* on a Properly-Formulated Question That Encompasses the Statutory Interpretation Issues Covered in ATA's Conditional Cross-Petition.

The Government now concedes that EPA must develop a new interpretation of Sections 108 and 109 – at least to the extent necessary for it to consider the health "disbenefits" of lowering ground-level ozone levels. ATA agrees that EPA would benefit from this Court's plenary construction of these same sections, including whether the court of appeals was correct that EPA must ignore all factors "other than 'health effects relating to pollutants in the air'" in setting NAAQS. App. 15a; *see* ATA Cross-Petition. Review by the Court at this stage would increase the likelihood that EPA's next NAAQS rulemaking will be more successful than its last. *Cf.* Pet. 19 ("This Court should grant review . . . before EPA and other agencies refocus the[ir] analyses").

As drafted by the Government, however, the first question contains two significant flaws. *First*, it is somewhat misleading,

as it emphasizes the issue of whether Section 109 is unconstitutional (which it undisputedly is not), and downplays the real issue in this case: whether EPA used a standardless *interpretation* when issuing its ozone and PM NAAQS. Accordingly, the question presented should be reformulated to reflect accurately the holding of the court of appeals, and thus the issue before this Court, to wit: whether the court of appeals correctly rejected EPA's standardless interpretation, and remanded under *Chevron* for the Agency to fashion and apply a proper interpretation.

Second, the Government's question fails expressly to mention the court of appeals' interrelated and imbedded ruling that EPA may not consider "any factor other than 'health effects relating to pollutants in the air'" in setting a NAAQS. App. 15a. The court below recognized that this ruling would constrain the Agency's ability to develop an "intelligible principle" on remand, but felt it was precluded by circuit precedent from ruling otherwise. *See id.* at 18a. In order to ensure that *this Court* is not encumbered by arguments contending that it is jurisdictionally barred from issuing a comprehensive interpretation of the relevant provisions, and also to ensure that EPA receives the full and final guidance that it has requested, the Court should grant, or at least hold in abeyance, ATA's conditional cross-petition.

II. THIS COURT SHOULD DENY *CERTIORARI* ON THE SUBPART 2 QUESTIONS PRESENTED.

If it had properly formulated and presented its first question alone, EPA would have brought before the Court what is likely the most significant administrative law case since the 1980s trilogy of *Benzene*, *Chevron*, and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). But instead, EPA has sought to piggy back onto that single *cert*-worthy question, two additional questions that do not deserve the Court's attention. Those two additional questions, both entirely unrelated to the main question presented, are (1) whether the court of appeals erred in

unanimously concluding that EPA's rulings on the Act's Subpart 2 are final and ripe for review; and (2) whether the court erred in unanimously rejecting EPA's contention that Subpart 2 could be effectively nullified. Taking those two unworthy questions would needlessly complicate what already promises to be an unusually complex case with numerous parties and the intersection of statutory construction, constitutional, and administrative law issues. As demonstrated below, neither question is remotely worthy of *certiorari*.

A. This Court Should Deny *Certiorari* on Both Subpart 2 Questions, Because, Unlike the Main Issue, Those Questions Are in an Interlocutory Posture.

Resolution of the second and third questions presented by EPA would have no practical effect at this time. Those issues address the question whether EPA may *implement* and *enforce* a revised ozone NAAQS outside of the framework provided by Subpart 2. They do *not* address – indeed they are entirely separate from – the question of the statutory standards and record that gover EPA's *promulgation* of a revised ozone NAAQS. Accordingly, any ruling by this Court on the second and third questions presented would not take effect until EPA promulgates a revised ozone NAAQS on remand – a point that EPA itself has underscored by suspending its implementation activities following the D.C. Circuit's invalidation of the revised ozone NAAQS. *See* 64 Fed. Reg. 57,424, 57,425 (Oct. 25, 1999).

How far off is a conclusion to any ozone remand proceedings and the first practical effects of the appellate court's Subpart 2 decision? *First*, EPA must revise its Section 108 criteria document for ozone, which will entail scientific review of not only ozone's heretofore ignored "positive effects," but also of the rest of "the latest scientific knowledge" relevant to ozone's effects on human health and welfare. CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). *Second*, CASAC must review that revised criteria document. CAA § 109(d)(2)(B), 42 U.S.C.

§ 7409(d)(2)(B). *Third*, EPA must draft a revised ozone NAAQS based in part on the revised criteria document and CASAC's review. *See* CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). *Fourth*, EPA must provide CASAC sufficient time to review its new proposal. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2)(B). *Fifth*, EPA must issue a notice of proposed rulemaking that explains any differences between its proposed rule and CASAC's recommendations. *See* CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). *Sixth*, EPA must permit time for meaningful comment, and respond to all significant comments. *See* CAA §§ 307(d)(5), (6)(B), 42 U.S.C. §§ 7607(d)(5), (6)(B).

All by itself, the three to five years that likely will be required to complete these steps is sufficient to warrant denial of *certiorari* on both Subpart 2 questions. "[E]xcept in extraordinary cases, the writ [of *certiorari*] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Ironically, EPA's petition only underscores this dispositive point. By principally contending that the D.C. Circuit erred on finality/ripeness grounds, EPA would place the proper time for review even farther out into the future.

To be sure, EPA must hope that its unworthy Subpart 2 issues can be smuggled into this Court under cover of the entirely separate first question presented. But the logic of ATA's acquiescence to *certiorari* on the main issue does not carry over to the Subpart 2 issues. On the main question, there is substantial disagreement within the D.C. Circuit, the nation's busiest administrative law court, concerning the interrelated statutory construction, constitutional, and administrative law issues presented here. Even if presented in an interlocutory posture (which it is not), *that* question – as opposed to unanimous rulings on non-recurring issues – is the type of question on which the Court might properly grant *certiorari*. *Cf.* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE § 4.18 at 196 (7th ed. 1993) (interlocutory *certiorari* may be granted

"where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case").

But more importantly, the main question, unlike the Subpart 2 questions, is *not* in an interlocutory posture. EPA's regulations for fine particulate matter – the costliest part of the combined rulemakings with a minimum price tag of *$37 billion per year* – were invalidated based *only* on the court's rejection of EPA's standardless interpretation of the Act. If that invalidation is overturned, the fine PM rules would spring immediately back to life. By contrast, the Subpart 2 implementation issues are of no practical moment until EPA has completed the lengthy, multi-year remand proceedings independently required for ozone. Accordingly, even if the Subpart 2 issues otherwise warranted review (which they do not, *see* Sections B and C below), both the court of appeals and this Court will have ample time to provide that review years hence, once a valid ozone NAAQS has been promulgated. Until then, *certiorari* should be denied.

B. The Subpart 2 Merits Question Does Not Warrant *Certiorari*.

Under the traditional test for *certiorari*, the Subpart 2 merits issue may be one of the most unlikely candidates for review that this Court ever encounters in a government petition. Put aside the absence of dissents on this issue below, at either the panel or the *en banc* stage. The truth remains that the court's Subpart 2 ruling affects the interpretation of only one statute, can never give rise to a split among the circuits, and will not have any practical effect for years to come. As demonstrated below, those facts, coupled with an ever-changing EPA position on the issue and a decision below that is unassailable on its merits, make this issue a most unlikely candidate for *certiorari*.

1. The Subpart 2 Merits Question Fails to Satisfy the Criteria for Certiorari. The Subpart 2 issue involves "EPA's authority to implement and enforce [a] revised ozone NAAQS." Pet. 19-20. But the essential precondition to implementing or

enforcing a "revised" ozone NAAQS is, of course, the valid *promulgation* of a revised ozone NAAQS. Until that occurs, questions of enforcement and implementation cannot possibly arise.

In the meantime, there is no chance that the D.C. Circuit's decision will have ripple effects. Only the D.C. Circuit reviews NAAQS revisions, CAA § 307(b), 42 U.S.C. § 7607(b), so there is no potential for an inconsistency to develop among the circuits. Nor did the D.C. Circuit misstate or improperly invoke the rule of *Chevron*, the governing legal principle here. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *cf. Ross v. Moffitt*, 417 U.S. 600, 617 (1974) ("perceived correctness" is not a primary factor in granting *certiorari*); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Supreme Court does not sit as court of error).

For their part, the state petitioners claim that review is needed to dispel the "enormous uncertainty for the states as regulators." *See* Pet. of Mass. and N.J. 29. But any "uncertainty" that might once have existed has now been dispelled by the passage of the deadline for challenging the ruling invalidating the ozone NAAQS for EPA's failure to consider health "disbenefits." All States now know or should know that the 0.12 ppm one-hour ozone NAAQS, implemented and enforced via the congressionally-enacted regime of the Act's Subpart 2, is the only enforceable ozone NAAQS for the foreseeable future. True enough, there may be time lags involved as EPA reshapes its regulations to conform to this legal reality. *See id.* at 26-27 (describing such problems). But that is always the case when agency actions are reversed and new proceedings must be commenced.

Moreover, notwithstanding its claim to deference, *see* Pet. 25, 28-29, EPA now asserts that it has yet to complete its "full thinking" on this issue. *Id.* at 24; *see also id.* at 10 (Agency still needs time "to develop fully its interpretation").

This is an EPA assertion that rings true. Before the appellate panel, EPA argued that Congress had committed a particular scrivener's error. *See* App. 42a (EPA argues "section 107(d)" actually means "section 107(d)(4)"). Before the *en banc* court it argued for a different scrivener's error. *See id.* at 42a (EPA argues "section 107(d)" actually means "section 107(d)(1)(C) and section 107(d)(4)"). In this Court, EPA has now put claimed scrivening errors aside in favor of arguing about the statutory "context[s]." Pet. 28 n.16; *see* pp. 22, below. There should accordingly be an extraordinarily strong, conclusive presumption against review here, where EPA continues to change legal theories and the court of appeals has expressly left open the door to further proceedings once EPA promulgates a new rule (and identifies a coherent statutory interpretation) years out into the future. *See* App. 81a.

2. *The D.C. Circuit Correctly Decided the Subpart 2 Merits Question.* The Subpart 2 legal issue no doubt appears complex to the uninitiated. It involves EPA's authority to promulgate a revised ozone NAAQS, and then designate, classify, and set attainment dates for areas based on that revised NAAQS. In this Court, however, EPA seeks *certiorari* on a very narrow, easily-answered issue: whether the *specific* classifications and attainment dates set forth in Subpart 2 of the Act for the ozone NAAQS "restrict EPA's *general* authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

EPA's question answers itself, for "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Moreover, EPA's theory, as the court of appeals unanimously recognized, would have rendered Subpart 2 "stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments," and then proceeded to implement the revised NAAQS outside of the Subpart 2 framework. App. 42a. As the court of appeals held,

EPA cannot so easily eviscerate the "comprehensive enforcement scheme enacted in Subpart 2." *Id.* at 41a.

EPA correctly acknowledges that this issue turns on "the interplay among Section 107(d), Section 172, Section 181, and other relevant provisions" of the Act. *See* Pet. 24. Section 107(d) requires that "upon promulgation or revision" of a NAAQS, "the Administrator shall promulgate the designation of all areas" as "attainment," "nonattainment," or "unclassifiable." CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). As a general matter, Section 172 of Subpart 1 of the Act grants EPA authority to give classifications to those areas that it has designated as being in nonattainment, and to set attainment dates for those areas based on their classifications. *See* CAA § 172(a), 42 U.S.C. § 7502(a). By Section 172's own terms, however, that authority "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part," or "with respect to areas for which attainment dates are specifically provided under other provisions of this part." CAA §§ 172(a)(1)(C), (2)(D), 42 U.S.C. §§ 7502(a)(1)(C), (2)(D).

In the case of the ozone NAAQS, Section 181 of Subpart 2 provides that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) of this title [CAA § 107(d)] *shall* be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1 then provides classifications and attainment dates based on a region's design value (a measure of its ozone level). *See id.*

As the court of appeals explained, these provisions unambiguously refute EPA's contention that it can ignore Subpart 2 by "establish[ing] classifications and attainment dates and tak[ing] other implementing actions for the revised ozone NAAQS under Subpart 1." Pet. 27. In particular, Section 181(a) states that it applies to "[*e*]*ach* area designated

nonattainment for ozone *pursuant to section 7407(d)* [*CAA section 107(d)*]"; and Section 107(d), in turn, governs the "promulgation *or revision* of a national ambient air quality standard." *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added); CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i) (emphasis added). Subpart 2 thus applies by the plain terms of Sections 107(d) and 181(a)(1) to *any* "ozone" NAAQS, including a revised ozone NAAQS.

EPA thus finds itself with no rejoinder for the argument that "Congress has spoken to the precise question at issue" and resolved it adverse to EPA. *See* App. 38a (citation and internal quotation marks omitted). The argument EPA tried below, that section 172 provides authority to enforce a revised NAAQS entirely apart from section 181(a) and the rest of Subpart 2, *see* EPA Ozone Br. at 67, is of no help, for that section emphasizes that it "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part." CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C).

In the court of appeals, EPA also argued that Section 181(a)(1)'s reference to the entirety of "Section 107(d)" is a scrivener's error, and that Subpart 2 should instead be read to apply only to designations made under particular parts of Section 107(d). *See, e.g.*, App. 79a. But as the D.C. Circuit explained, there is no basis for deeming the plain language of Section 181(a)(1) the "drafting error that the EPA's interpretation implies." *Id.* at 39a. In fact, "all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d)" in its entirety. *Id.* at 79a. EPA's "interpretation" thus posits not an isolated scrivening error, but a total scrivening breakdown.

Although derided by EPA as "highly technical," App. 28 n.16, the appellate court's analysis is a conventional, straightforward, statutory interpretation under the first prong of *Chevron*. EPA now downplays all of this evidence in an extended footnote that argues in favor of a fuzzy, multi-factor

analysis conducted under the rubric of "context." But that analysis identifies factors that might be relevant, at most, to *resolving* an ambiguity. *See* Pet. 28 n.16. Such considerations certainly cannot be used to *create* an ambiguity in the first place. *See* App. 43a. Moreover, if any ambiguity did exist, it would undoubtedly be resolved to EPA's disadvantage based on the persuasive evidence that Congress specifically considered and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims the *enacted* statute does. *See* App. 39a (discussing the drafting history of the 1990 amendments).

Whatever interpretation EPA may devise after taking "full opportunity" for further reflection, Pet. 21, the fact will remain that Congress replaced the pre-1990 discretionary regime of EPA ozone enforcement with a more stable, democratically-legitimate regime of *congressionally-mandated* controls. EPA may ask Congress to amend the Act, but it is not free to repeal Subpart 2, either by deeming it a "drafting error," or by invoking some insubstantial notion of "context." *See* App. 39a.

C. The Subpart 2 Ripeness/Finality Question Does Not Warrant *Certiorari*.

The remaining question EPA presents is largely contrived. EPA never argued that its Subpart 2 ruling was not final until *after* the panel had decided this issue against it. *See* App. 77a. Nor did the Agency devote more than a sentence of its court of appeals brief to its half-hearted ripeness challenge. *See id.* at 79a. Not surprisingly, the panel on rehearing summarily and unanimously rejected EPA's newfound position, App. 77a-79a, and not a single member of the *en banc* court disagreed.

1. The Subpart 2 Implementation Issues Were Included Within Other Unquestionably Final and Ripe Claims. EPA now complains loudly that the court below should have determined only whether Section 181 of Subpart 2 "precluded EPA from *promulgating* the revised standard," without ever addressing whether that section governed "how EPA could

implement the revised NAAQS." Pet. 21 (emphasis added). But that argument imagines a procedural history divorced from reality. In the actual proceedings, these two claims that EPA imagines as different were in fact one and the same claim.

EPA acknowledges, as it must, that the respondents argued before the agency that Section 181 "precluded EPA from revising the ozone NAAQS" pursuant to Section 109. Pet. 7. That argument rested on two premises: (1) what might be called the "implementation premise," the claim that section 181(a)(1) of the Act directs EPA to classify "each" nonattainment area for ozone according to the Subpart 2 categories, and (2) what might be called the "designation premise," the claim that section 107(d) requires "EPA to designate *all areas*" and requires a nonattainment designation for "*any* area that does not meet the NAAQS." J.A. (Ozone) at 3140-41. These two premises led respondents to conclude that the Act "expressly forbids downward revisions (but not upward revisions) to the 0.120 standard," *id.* at 3139, because in making such revisions, EPA would be "forced to violate the Act" – by discarding either section 181(a)(1) or section 107(d) or both.

Confronted with this argument in the agency rulemaking, EPA responded almost exclusively to the "implementation premise," arguing that Section 181 does not "prohibit[] EPA from revising the [ozone] standard" under Section 109 *because the Agency may "implement the revised [ozone] standard" outside of the Subpart 2 framework.* 62 Fed. Reg. at 38,885; *see also* EPA Ozone Br. at 67-72. Moreover, in the Court of Appeals, EPA continued to defend its authority to *promulgate* a revised standard based on its disagreement with the "implementation" premise, while implicitly contesting, but never fully discussing, the "designation" premise. *See* EPA Ozone Br. at 67-72.

To resolve this dispute, as it did, under step one of *Chevron*, the court of appeals necessarily had to bring to bear the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including analysis of the statute as a whole. Also

under *Chevron*, the court had a duty to use as a starting point the implementing agency's own construction; that is, to address the specific link in the chain of logic that the EPA itself predominately contested – the "implementation" premise. Accordingly, if EPA's ripeness and finality concerns now seem at all plausible, it is only because they emit a distorted echo of two entirely innocent facts. The court below, in addition to ruling *against* EPA on the implementation issues it *did* contest vigorously, went on to rule *in EPA's favor* on the designation issues it *failed* to contest vigorously. In addition, the court composed an opinion that presents these issues in what it considered a comprehensible order, without noting that it was bound to rule first on the implementation premise that the agency itself had used as its primary legal defense.

2. *The Decision Below Is Not in Conflict With Decisions of this Court or Other Circuits.* There is no support whatever for EPA's contention that the court of appeals "adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals." Pet. 10, 21. In particular, EPA's contention that this Court should accept review because the D.C. Circuit's decision "distorts" this Court's decision in *Bennett v. Spear* is mystifying. *See id.* at 22 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).

Bennett merely repeats the well-established standard for administrative finality. *See* 520 U.S. at 177-78 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 113 (1948)). The Court there held that the agency ruling at issue was final because it "alter[ed] the legal regime" – even though it did *not* "conclusively determine" the plaintiffs' rights. *See Bennett*, 520 U.S. at 177, 178. As that holding suggests, the two prongs of the finality test recited in *Bennett* are not the inflexible rules that EPA makes them out to be. Rather, "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in

a pragmatic way" by taking a "flexible view of finality." *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980) (internal quotations omitted).

Here, the panel unanimously held that the Agency's Subpart 2 ruling is final because (1) it is not tentative, and (2) legal consequences flow from it. *See* App. 77a-78a. There is no sense in which that decision conflicts with *Bennett*. Rather, the most that EPA could plausibly contend is that the D.C. Circuit misapplied "a properly stated rule of law," a claim that does not supply a proper ground for *certiorari*. *See* Sup. Ct. R. 10; *Magnum*, 262 U.S. at 163.

Nor does the D.C. Circuit's decision stand in conflict with decisions of other courts of appeals. In particular, the *Dow Chemical* case highlighted by the Government holds only that statements made "while requesting certain data" prior to the initiation of an enforcement action, as well as statements made in an "amendment of [an] enforcement suit," are not final agency action. *See Dow Chem. v. EPA*, 832 F.2d 319, 324, 325 (5th Cir. 1987). The other cases cited by the Government similarly hold only that the initiation of an administrative investigation or adjudicatory process, or the announcement of an interlocutory ruling in the course of an ongoing administrative proceeding, is likewise not final. *See Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1199 (10th Cir. 1999); *American Airlines, Inc. v. Herman*, 176 F.3d 283, 289 (5th Cir. 1999); *Hindes v. FDIC*, 137 F.3d 148, 162-63 (3d Cir. 1998). Those cases all involved truly interlocutory matters, not, like this case, a final rule, published in the *Federal Register*, and made expressly reviewable by statute. *See* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). Moreover, the absence of any circuit split is further underscored by the fact that *Mobil Exploration* explicitly relied on D.C. Circuit precedent, *see* 180 F.3d at 1199, while *Dow Chemical* specifically distinguished as inapposite one of the very D.C. Circuit cases on which the panel below relied. *See*

832 F.2d at 325 n.35 (distinguishing *Ciba-Geigy v. EPA*, 801 F.2d 430 (D.C. Cir. 1986)); App. 77a (quoting *Ciba-Geigy*).

3. The Court of Appeals' Decision Is Correct. On the merits, EPA appears to be claiming that its Subpart 2 ruling will not be final until a revised ozone NAAQS is actually implemented and enforced in a specific area. *See* Pet. 22. In particular, EPA argues that the first prong of the finality test is not met because it has not "completed its decisonmaking process under the governing statute for the specific agency action at issue," since it "has not designated nonattainment areas, classified those areas, or set attainment dates" for those areas. *Id.* The Agency similarly contends that the second prong is not satisfied because "ATA will not be affected by EPA's views on implementation of the revised ozone NAAQS until the agency takes actual steps to implement the NAAQS by designating and classifying nonattainment areas and setting attainment dates." *Id.* at 23.

But EPA did far more in the rulemaking below than merely promulgate the revised NAAQS. Based on its "interpretation" of "the provisions of subpart 2," EPA's final ozone rule specifies the point at which Subpart 2 and the existing ozone NAAQS "will no longer apply." 62 Fed. Reg. at 38,873; *id.* at 38,894 (codifying this ruling into 40 C.F.R. § 50.9(b)). The Agency also determined, simultaneously with the ozone NAAQS revisions, how and where its new ozone NAAQS would be enforced. 62 Fed. Reg. 38,423, 38,424-27 (1997). EPA then issued three final rules revoking the existing ozone NAAQS in certain areas. *See* 64 Fed. Reg. 30,911 (June 9, 1999); 63 Fed. Reg. 39,432 (July 22, 1998); 63 Fed. Reg. 31,014 (June 5, 1998). Only after the D.C. Circuit issued its opinion in this case did EPA cease its "continu[ing] implementation efforts with respect to the 8-hour standard." 64 Fed. Reg. at 57,425.

In any event, the Government's argument against pre-implementation review "has the hollow ring of another era." *Port of Boston*, 400 U.S. at 71. Modern finality jurisprudence

has "interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779 (1983). This Court has specifically rejected the "argument that [an] order lacked finality because it had no independent effect on anyone and resembled an interlocutory court order," *Port of Boston*, 400 U.S. at 70-71, and has routinely authorized pre-enforcement review of agency determinations. *See, e.g., Bell*, 461 U.S. at 779-80; *Harrison v. PPG Indus.*, 446 U.S. 578, 586 (1980) (EPA ruling final under CAA § 307(b)(1) where "[s]hort of an enforcement action, EPA has rendered its last word on the matter"); *Port of Boston*, 400 U.S.at 70-71; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 149-51 (1967) (citing cases).

As the D.C. Circuit has repeatedly held, these precedents have particularly strong force in the context of the Act. Congress has, on the face of that statute, "declared a preference for prompt review" by providing that petitions for review of EPA rulemakings must be filed "within 60 days from the date notice of such . . . action appears in the federal register." *See NRDC v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (citing CAA § 307(b)(1)) (internal quotation omitted); *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (same). The D.C. Circuit has therefore always understood EPA's general NAAQS implementation rulings (as opposed to its specific classification decisions) to be final even before they have been applied in the context of a particular state's submission of a SIP. *See NRDC*, 22 F.3d at 1133.

So has EPA. Tellingly, EPA accepted the D.C. Circuit's virtually identical ruling in *NRDC* without even petitioning for review in this Court. More telling still, in a different proceeding before the D.C. Circuit last summer, EPA argued that a separate petition for review that challenged the Agency's now-suspended implementation of the revised ozone NAAQS was precluded precisely because *this case* is the proper vehicle for resolving such challenges. In particular, EPA contended that because the

Agency's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was "resolved by the 1997 Rule" (*i.e.*, the rulemaking below), challenges to that interpretation had to be brought in *this* proceeding, not in subsequent actions challenging specific implementation decisions. *See* Br. of Resp. U.S. E.P.A. in D.C. Cir. No. 98-1363 (filed June 21, 1999), at 27-28, 29-30.

In sum, EPA would have this Court grant *certiorari* and hold its Subpart 2 ruling non-final even though (1) the D.C. Circuit had to resolve the Subpart 2 issue in the course of deciding whether EPA had authority to promulgate the revised ozone NAAQS; (2) EPA recognized as much by not disputing the finality of its ruling until after it lost in the court of appeals; (3) there is no circuit conflict for this Court to resolve; (4) this Court has long emphasized that the finality test is pragmatic and flexible; (5) EPA began implementation activities in the underlying rulemaking itself; (6) Congress expressed a desire for prompt pre-implementation review of EPA's actions under the Act; (7) multiple panels of the D.C. Circuit have long rejected EPA's contention; and (8) EPA is trying to have it both ways in order to evade judicial review altogether. There is no justification for *certiorari* in such circumstances.

EPA's ripeness challenge fails for similar reasons. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (internal quotation omitted). Accordingly, this Court has consistently held EPA rulings to be fit for review where, as here, "[t]he issue presented . . . is purely legal, . . . will not be clarified by further factual development," and has had pre-enforcement effects such as those described above. *See id.* at 581; *see also EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980). Moreover, this Court has authorized pre-implementation review of a variance clause in an EPA regulation where the validity of the variance clause was intertwined with the validity of the

regulation as a whole. *See National Crushed Stone*, 449 U.S. at 72 n.12. As explained above, that is precisely the situation that the court of appeals confronted here: interpretation of Subpart 2 is intertwined with an argument made below (but not in this Court) regarding interpretation of EPA's authority to revise the ozone NAAQS. The issue was therefore ripe for review in the court below.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* on a properly formulated question which encompasses the statutory interpretation issues covered in ATA's conditional cross-petition. The Court should deny the Government's petition on the second and third questions presented, as well as all questions presented by the American Lung Association and the State Petitioners.

Respectfully submitted,

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